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No. 02-1343

In the Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION, ET AL.,

Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., THE AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, AND THE TAXICAB, LIMOUSINE & PARATRANSIT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae American Trucking Associations, Inc. (ATA) is a nonprofit corporation organized under the laws of the District of Columbia. ATA is the national trade association of the trucking industry, with more than 2000 direct members. As an umbrella organization for state associations and national trucking conferences, ATA represents tens of thousands of motor carriers and suppliers to motor carriers. ATA regularly advocates the trucking industry's concerns before the courts and federal administrative agencies.

Amicus curiae American Road & Transportation Builders Association (ARTBA) is a not-for-profit trade association headquartered in Washington, D.C. ARTBA represents the collective interests of all sectors of the U.S. transportation construction industry in matters before the courts, Congress, the Executive Branch, and administrative agencies. ARTBA acts as an umbrella group for more than 5000 members of the transportation construction industry.

Amicus curiae Taxicab, Limousine, & Paratransit Association (TLPA) is a not-for-profit trade organization for the private passenger transportation industry. TLPA's membership includes approximately 1100 taxicab companies, executive sedan and limousine services, airport shuttle fleets, non-emergency medical transportation companies, and paratransit services. TLPA is the primary legislative advocate and education resource for the private ground transportation industry.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

ATA, ARTBA, and TLPA believe that the Ninth Circuit's decision incorrectly decided the issues raised in the petition for certiorari and will cause extraordinary harm if those issues are not addressed by the Court. The Ninth Circuit's decision opens the door to the creation of "patchwork" standards for emissions control by States and their various political subdivisions, in direct contravention of the express preemption of state and local regulation by Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a).

Members of ATA, ARTBA, and TLPA will be deeply affected by the Ninth Circuit's failure to overturn the South Coast Air Quality Management District (SCAQMD) standards at issue.

STATEMENT

Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), provides (emphasis added):

> No State or any political subdivision thereof shall adopt or attempt to enforce *any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines* subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Notwithstanding Section 209(a), SCAQMD – a political subdivision of the State of California – has enacted six "Fleet Rules," which are restrictions on the choice of vehicles available for fleet operators, including members of *amici* ATA, ARTBA, and TLPA, to purchase or lease. The Fleet Rules all have the stated purpose of "reduc[ing] air toxic and criteria pollutant emissions," *e.g.*, Rule 1186.1, www.aqmd.gov/rules/html/r1186-1.html, and define permissible vehicles for fleet operators to purchase by the use of differing levels of emission-control technologies.

Rule 1186.1 regulates public and private fleets of street sweepers, and requires that covered fleet operators purchase or lease new street sweepers that are powered by alternative fuel sources. See Pet. App. 18a. For a limited time, a fleet operator may also qualify for an exception and be permitted to operate diesel-powered street sweepers fitted with emission-reducing exhaust control devices.

Rule 1191 regulates public fleets of passenger cars, light-duty vehicles, and medium-duty vehicles, and affects public fleet operators within SCAQMD with fleets of 15 or more vehicles. Fleet operators are required to purchase or lease new vehicles from a list, promulgated by the California Air Resources Board (CARB), that includes Low Emission Vehicles (LEV), Ultra Low Emission Vehicles (ULEV), Super-Ultra Low Emission Vehicles (SULEV), or Zero-Emission Vehicles (ZEV). Fleet operators also have the discretion to purchase alternative-fuel vehicles that CARB has certified as meeting, or exceeding, ULEV emissions standards. See Pet. App. 16a.

Rule 1192 applies to public fleets of urban buses with 15 or more vehicles. Except as specifically exempted, fleet operators are required to acquire alternative fuel vehicles that meet emissions requirements spelled out in the California Code of Regulations. See Pet. App. 16a-17a.

Rule 1193 applies to public and private fleets of solid waste collection vehicles with 15 or more vehicles. Except as exempted, fleet operators replacing or adding new vehicles to the fleet must purchase or lease alternative-fuel solid waste collection vehicles. See Pet. App. 17a. Operators of covered fleets with fewer than 50 vehicles may also purchase or lease dual-fuel vehicles that meet CARB emission standards, and within the first year the Rule is in effect operators of larger fleets may also purchase or lease dual-fuel vehicles.

Rule 1194, applying to public and private fleets providing passenger transportation service from commercial airports, requires graduated increases in percentages of the total of new

fleet vehicles purchased or leased to be from the three most stringent categories of LEVs, according to the emissions standards promulgated by CARB. See Pet. App. 17a-18a. New purchases or leases by a fleet operator subject to the Rule must be either ULEVs, SULEVs, or ZEVs.

Rule 1196 applies to public fleets of heavy-duty vehicles, and requires that all new additions to the fleet will be alternative-fuel vehicles, dual-fuel vehicles, gasoline-powered vehicles, or, if the fleet operator can demonstrate the technical infeasibility of the prior three alternatives, a diesel-powered vehicle with an approved control device. See Pet. App. 18a-19a. To qualify for the fourth option, the fleet operator must seek special certification from SCAQMD before purchase or lease of the new diesel-fuel vehicle. Each option under Rule 1196 must meet CARB standards for emissions applicable to the particular type of vehicle.

The SCAQMD Fleet Rules were promulgated without following any procedure provided under the Clean Air Act for receiving a waiver from federal preemption.

As is explained in the petition for a writ of certiorari, petitioners brought suit to enjoin the Fleet Rules on the ground that they are preempted by Section 209(a) of the Clean Air Act. District Judge Florence-Marie Cooper rejected that challenge in its entirety, and the Ninth Circuit affirmed on the basis of the district court's opinion. Taking a non-textual approach to interpretation of Section 209(a) – which preempts *every* "standard relating to the control of emissions" – the courts below attached dispositive significance to the fact that "[t]he Rules regulate the purchasing and leasing, not the sale, of vehicles by fleet operators" (Pet. App. 21a) and "therefore do not run afoul of" what the courts deemed to be "Congress's purpose behind motor vehicle preemption" (*ibid.*). But see Pet. App. 41a (expressing view of the United States that such an approach to construing Section 209(a) is impermissible).

SUMMARY OF ARGUMENT

Under the Ninth Circuit's ruling, any State or political subdivision of a State can adopt and attempt to enforce standards relating to the control of emissions from new motor vehicles or new motor vehicle engines, in direct derogation of the language and intent of Section 209(a) of the Clean Air Act, as long as the State or political subdivision regulates purchases rather than sales. The language of Section 209(a), the preemption section of Title II of the Clean Air Act, could not be clearer in prohibiting that result. This Court has interpreted identical language to state a broad preemptive purpose. Such broad preemption in this case unquestionably reaches the SCAQMD Fleet Rules. The structure of Section 209, where the preemption section resides, supports the broad interpretation of the section's preemptive scope to reach the SCAQMD Fleet Rules. The language and structure obviate any need to look to the legislative history of Section 209, but that, too, supports the conclusion that the SCAQMD Fleet Rules are a preempted exercise of state regulatory authority.

The Ninth Circuit has in this case introduced confusion into a legislative scheme where none previously existed. Every other circuit to address the issue has understood the breadth of Section 209(a) preemption. District court decisions that have not been subject to appellate review have also reached the correct conclusion. Until Judge Cooper's opinion for the district court, and the Ninth Circuit's affirmance on the basis of that opinion, there was no debate that, except for the State of California – under a limited waiver, not complied with here – States and their political subdivisions could not promulgate separate standards relating to the control of emissions from new motor vehicles and motor vehicle engines. The Ninth Circuit's decision in this case utterly upends the legislative scheme.

The overwhelming national importance of this issue supports a grant of certiorari to resolve the extent of preemption under Section 209(a). The potential effect of allowing the Ninth Circuit's decision to stand is difficult to overstate. Each

individual State or political subdivision of a State within the Ninth Circuit is now free to promulgate its own emissions standards, subject only to the limitation that it apparently may not implement a technology-forcing requirement. *Amici curiae* have large numbers of members that will (if the decision below stands) be forced to incur additional costs to their businesses to comply with the SCAQMD rules, and untold additional costs should the likelihood of subregion-by-subregion regulation come to pass. The Court should take this opportunity to clarify the scope of Section 209(a) preemption.

ARGUMENT

I. IN FAILING TO INTERPRET SECTION 209(a) AS PREEMPTING THE SCAQMD FLEET RULES, THE NINTH CIRCUIT CONTRAVENED THE PLAIN AND UNAMBIGUOUS LANGUAGE AND PURPOSE OF THE CLEAN AIR ACT

Judge Cooper's and the Ninth Circuit's interpretation of Section 209(a) reads Congress's unambiguous intent to preempt state and local standards for control of emissions out of the Clean Air Act. The existence and breadth of Congress's preemptive intent when enacting Section 209(a) is not subject to serious debate. Its application to the SCAQMD Fleet Rules is apparent from the language, structure, and legislative history of the Clean Air Act and from a base understanding of the Fleet Rules themselves.

Section 209(a), headed "Prohibition," is the preemption section of Title II of the Clean Air Act, which deals with motor vehicle emissions standards. Section 209(a) states:

> No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a). Section 209(a)'s unambiguous pre-emption of state regulation is reflected in this Court's case law, as well as decisions of lower courts nationwide. See *Washington* v. *General Motors Corp.*, 406 U.S. 109, 114-115 (1972) ("Congress has largely pre-empted the field with regard to 'emissions from new motor vehicles.'") (citing to the former codification of Section 209(a) as 42 U.S.C. §§ 1857f-9 to 1857f-12); see also, *e.g.*, *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1078-1082 (D.C. Cir. 1996) (explaining Section 209(a) preemption).

Judge Cooper's opinion for the district court below (which the Ninth Circuit adopted in total) took enormous liberties with the state of preemption law as it applies to Section 209(a). The courts below followed a misguided understanding that this Court's case law dealing with express preemption requires the construction of federal enactments to avoid preemption whenever a State has any history of regulatory expertise. Compare Pet. App. 9a ("'Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state. Environmental regulation has traditionally been a matter of state authority.'") (quoting *Exxon Mobil Corp.* v. *EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000)) with *General Motors*, 406 U.S. at 114-115 ("Congress has largely pre-empted the field with regard to 'emissions from new motor vehicles.'"). This Court has repeatedly made clear that the law of preemption is otherwise. Where Congress has expressly stated its intent to preempt state regulation in a field, Congress's intent will be respected. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). Congress's preemptive intent is manifest in the unambiguous language of Section 209(a), and no reason exists to look beyond that plain language. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

As Judge Cooper pointed out, this Court certainly holds, in appropriate cases, that particular state statutes are not preempted by the federal statutes at issue. See, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 501-502 (1996); *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 668 (1995). Judge Cooper's opinion relied on those cases to conclude that federal preemption under the Clean Air Act should be narrowly interpreted. Pet. App. 9a-10a. But the cited authorities are inapposite in the present context. Only *Travelers* considered language (in Section 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a)) comparable to Section 209(a), and, unlike the SCAQMD Fleet Rules, the state law that this Court held was not preempted did not "reference" the subject of the preemption clause. 514 U.S. at 656 ("the surcharge statutes cannot be said to make 'reference to' ERISA plans in any manner").

Judge Cooper's citation (Pet. App. 7a-8a) to *California* v. *FERC*, 495 U.S. 490, 497 (1990), for the proposition that courts must "give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme," exemplifies her injudicious choice of preemption authorities. In *California* v. *FERC*, this Court held that state laws *were* preempted, despite language in the Federal Power Act that read: "'Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.'" 495 U.S. at 497 (quoting 16 U.S.C. § 821). In contrast to the courts below, which construed Section 209(a) by resort to first principles concerning supposed presumptions against preemption of the historic police powers of the States, this Court's unanimous opinion in *California* v. *FERC* noted that "the meaning of [16 U.S.C. § 821] and the pre-emptive effect of the FPA are not matters of first impression." 495 U.S. at 497. Here, both prior case law construing Section 209(a) and all evidence of congressional intent – including, most

importantly, the statutory text – shows that Congress carefully considered and decided to preempt the States' role in regulating standards for emissions. When Congress has spoken so clearly, the heavy reliance by the courts below on presumptions against preemption is entirely unwarranted.

Morales, in which this Court construed a statute preempting "States from 'enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier,'" is particularly instructive because of the near identity of the language of the Airline Deregulation Act (ADA) preemption section, former 49 U.S.C. § 1305(a)(1) (now 49 U.S.C. § 41713(b)(1)), to Section 209(a) of the Clean Air Act. This Court applies the basic rule of statutory construction that courts should read the same (and similar) statutory language in a uniform manner. *Morales*, 504 U.S. at 383-384 (interpreting "relating to" in the ADA uniformly with the interpretation of "relating to" in this Court's ERISA preemption decisions). *Morales* held that the phrase "relating to" in former 49 U.S.C. § 1305(a)(1) was intended to preempt any state law with "'a connection with, or reference to'" the subject of the preemption clause. *Id.* at 384 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)).

Faced with an argument that, because the State did not "actually prescrib[e] rates, routes, or services," the State regulations were not preempted, this Court in *Morales* held that such an argument "reads the words 'relating to' out of the statute." *Id.* at 385. Yet SCAQMD prevailed on Judge Cooper and the Ninth Circuit to accept a nearly identical argument – that the Fleet Rules did not actually "compel the manufacturer [of a vehicle or engine] to reduce the actual *amount* of pollutants emitted." SCAQMD C.A. Br. 20 (emphasis in original).[2] Like the petitioner in *Morales*, SCAQMD tries to

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[2] The Ninth Circuit has been grudging in its interpretation of *Morales* even when interpreting the Airline Deregulation Act itself. As three

draw fine distinctions that give each noun in the statutory text the narrowest possible reading – ignoring the operative words "relating to" in Section 209(a).

The SCAQMD Fleet Rules are standards "relating to the control of emissions" even under the narrowest possible view of the *Morales* and *Shaw* precedents.[3] As this Court reiterated in *Travelers*, a state law "relates to" a subject of federal preemption if it has "a connection with or reference to" the area of preemption. 514 U.S. at 656. *Travelers* continued on to analyze the phrase "make 'reference to,'" holding that, because the challenged surcharges were imposed by state law regardless of the existence of an ERISA plan, the state law imposing the surcharges did not make reference to an ERISA plan. *Ibid.* By contrast, the SCAQMD Fleet Rules quite literally "make reference to" the control of emissions. The Fleet Rules impose "Fleet Purchase Requirements" based, in some cases solely and in some cases in part, on whether the relevant vehicles or

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Justices of this Court have observed, the Ninth Circuit's en banc decision in *Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc), narrowly construes the preemption section of that statute in conflict with the decisions of at least three other circuits. See *Northwest Airlines, Inc.* v. *Duncan*, 531 U.S. 1058 (2000) (O'Connor, J., joined by Rehnquist, C.J. & Thomas, J., dissenting from denial of certiorari). Judge Cooper relied on *Charas* to support her statement that "the Supreme Court has cautioned that preemption provisions must be narrowly and strictly construed." Pet. App. 8a.

[3] Indeed, Judge Cooper began her opinion by emphasizing how serious an air pollution problem the South Coast Air Basin has, and how important a contribution emissions make to that problem. Pet. App. 5a-6a; see *id.* at 5a ("Emission of particulate matters from diesel vehicles and equipment is the most significant individual toxic air pollutant in the Basin, accounting for fully seventy-one percent (71%) of the air-borne cancer risk."). Her obvious purpose was to praise respondents for doing something about the emissions problem through the Fleet Rules. Yet her legal analysis turns on the proposition that the Fleet Rules do not even "relat[e] to the control of emissions" within the meaning of the statute. Congress is entitled to have its words given more respect.

engines meet "emissions standards" imposed by the CARB. *Morales* and *Shaw* expose the error of the entire interpretive approach of the courts below in this case.

Congress's intent when enacting the Clean Air Act to preempt regulations like the SCAQMD Fleet Rules is clear from the text of Section 209(a) alone, but the structure and legislative history of Section 209 confirm the interpretation. Section 209(d) contains a savings clause: "Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." Courts have interpreted that clause to prevent preemption of "in-use regulations," such as HOV lanes, restrictions on car use in urban areas, and programs to limit excessive idling. See *Engine Mfrs. Ass'n* v. *Huston*, 190 F. Supp. 2d 922, 929 n.5 (W.D. Tex. 2001), vacated as moot, No. 01-50819 (5th Cir. Mar. 5, 2002); cf. *Engine Mfrs. Ass'n*, 88 F.3d at 1093 . This Court has held that the inclusion of a savings clause, like Section 209(d), demonstrates the breadth of the intended preemption. *Shaw*, 463 U.S. at 98. In *Shaw*, the express preemption clause in ERISA Section 514(a) was informed by the savings clause of Section 514(b): "It would have been unnecessary to exempt generally applicable state criminal statutes from pre-emption * * * if Section 514(a) applied only to state laws dealing specifically with ERISA plans." *Ibid.*; see also *Morales*, 504 U.S. at 385-386 ("Moreover, if the pre-emption effected by § 1305(a)(1) were such a limited one, no purpose would be served by the very next subsection, which preserves to the States certain proprietary rights over airports."). Under the inappropriately narrow reading given by Judge Cooper and the Ninth Circuit to Clean Air Act Section 209(a), the Section 209(d) savings clause has no meaning.

Section 209(b) provides an exception to federal preemption for standards set by the State of California, so long as California receives a waiver from the EPA. California, through CARB,

has set such alternate standards, and the EPA has granted a waiver. SCAQMD completely bypassed this waiver procedure in promulgating its Fleet Rules. Congress's provision, in Section 209(b) of the Clean Air Act, of a process for California to follow to accomplish the very goals SCAQMD claims to be pursuing bolsters the reading of Section 209(a) as preempting SCAQMD's Fleet Rules.

The text and structure of Section 209 leave no room for doubt as to the broad preemptive effect of Section 209(a), so resort to the legislative history is unnecessary. But the legislative history of the amendments to the Clean Air Act that inserted the preemption provision of Section 209 likewise completely undermines the conclusions of the courts below. "While the committee is cognizant of the basic right and responsibilities of the States for control of *air pollution*, it is apparent that the establishment of Federal standards applicable *to motor vehicle emissions* is preferable to regulation by individual States." H.R. Rep. No. 728, 90th Cong., 1st Sess., *reprinted in* 1967 U.S.C.C.A.N. 1938, 1955 (emphasis added). Cf. Pet. App. 8a-9a (relying heavily on *general* authority of States to address "air pollution" in case *specifically* involving regulation of emissions by a political subdivision). The Report continues: "The committee feels that a provision such as this is necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles." 1967 U.S.C.C.A.N. at 1956. The legislative history confirms what a plain-language reading of Section 209 already makes clear – that preemption was decided on as the means to ensure uniformity of standards for the control of emissions.

II. THE NINTH CIRCUIT'S DECISION INTRODUCES CONFUSION INTO A FEDERAL REGULATORY SCHEME THAT HAS HERETOFORE BEEN CLEARLY UNDERSTOOD BY EVERY COURT TO INTERPRET THE CLEAN AIR ACT

The breadth of the preemption under Section 209(a) has never been the subject of confusion in the federal courts.

The Clean Air Act preemption scheme has been subject to regular explication by federal courts, and all courts correctly understand that "regulation of motor vehicle emissions [is] a principally federal project." *Engine Mfrs. Ass'n*, 88 F.3d at 1079. Congress was concerned that "'an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers,'" might develop. *Ibid.* (quoting *Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979), cert. denied, 446 U.S. 952 (1980).

The petition for a writ of certiorari demonstrates that the Ninth Circuit's decision in this case conflicts with *American Automobile Manufacturers Association* v. *Cahill*, 152 F.3d 196 (2d Cir. 1998), and *Association of International Automobile Manufacturers, Inc.* v. *Commissioner, Massachusetts Department of Environmental Protection*, 208 F.3d 1 (1st Cir. 2000), and *amici curiae* will not fully replicate that discussion here. *Cahill* and *Commissioner* are prime examples of the correct application of the Section 209(a) preemption language. Both courts invalidated state requirements that a percentage of vehicles sold be ZEVs. *Cahill*, 152 F.3d at 200; *Commissioner*, 208 F.3d at 7. Both the First and the Second Circuits understood the phrase "standards relating to the control of emissions" to "describ[e] regulatory measures intended to lower the level of auto emissions." The ZEV sales requirements, having "no purpose other than to effect a general reduction in emissions," were preempted standards. *Cahill*, 152 F.3d at 200; see *Commissioner*, 208 F.3d at 6. As the petition discusses in greater detail, the First and Second Circuits have interpreted Section 209(a) preemption in a way that is diametrically opposed to the interpretation Judge Cooper and the Ninth Circuit reached below. The SCAQMD Fleet Rules, requirements that fleet operators purchase only certain vehicles – identified by their CARB certification as causing lesser emissions than other technology – have "no purpose other than to effect a general reduction in emissions." Nevertheless, Judge Cooper and the Ninth Circuit held that the Fleet Rules were not

"standard[s] relating to the control of emissions," and thus not preempted by Section 209(a). That result cannot be reconciled with *Cahill* and *Commissioner*.

Courts approaching Section 209(a) from a variety of other angles have also properly understood the breadth of the section's preemptive scope. In *Sims* v. *State of Florida, Department of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1454-1455 (11th Cir. 1989) (en banc), the Eleventh Circuit considered a state requirement that owners of "gray-market" automobiles – cars not intended to be imported into the United States, and thus not necessarily in compliance with U.S. safety and emissions standards – demonstrate certification by the EPA before being given a title or registration and before selling the vehicles. The court held that the state law was an "'attempt to enforce any standard relating to the control of emissions from new motor vehicles' prior to the initial sale," and was therefore preempted by Section 209(a). *Id.* at 1455 (quoting Section 209(a)) (emphasis and alteration deleted). Like the SCAQMD rules in this case, the Florida regulation was directed at the purchaser, not at the manufacturer or seller. *Ibid.* Accord *Direct Automobile Imports Ass'n* v. *Townsley*, 804 F.2d 1408, 1410-1412 (5th Cir. 1986); *Georgia Automobile Importers Compliance Ass'n* v. *Bowers*, 639 F. Supp. 352, 355-356, 357 (N.D. Ga. 1986).

The parallel preemption scheme contained in Section 209(e), which places limits on state regulation of nonroad vehicles such as construction equipment, likewise has received a consistently broad interpretation.[4] Under Section 209(e)(1), "No State or political subdivision thereof shall adopt or attempt

[4] *Amicus* ARTBA is especially concerned that the Ninth Circuit's decision below opens the door to similar regulation of emissions standards for nonroad motor vehicles that was previously understood to be preempted by Section 209(e).

to enforce any standard or other requirement[5] relating to the control of emissions" from construction or farm equipment. 42 U.S.C. § 7543(e)(1). Like Section 209(b), Section 209(e)(2)(A) exempts California from preemption if granted an EPA waiver, and, like Section 177, 42 U.S.C. § 7507 (discussed at Pet. App. 12a-13a), Section 209(e)(2)(B) permits other States to decide whether to adopt the federal standards or the California standards. 42 U.S.C. § 7543(e)(2)(A)-(B); see *Engine Mfrs. Ass'n*, 88 F.3d at 1080-1081 (discussing the nonroad vehicle preemption issue). The similarity in language between Section 209(a) and Section 209(e)(1) requires that the sections be interpreted consistently. See *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) (citing the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning").

In *Huston*, the court held that Section 209(e)(1) preempted a Texas Natural Resources Conservation Commission (TNRCC) "fleet composition rule" that was identical in all pertinent respects to the SCAQMD Fleet Rules. TNRCC required individuals operating construction machinery in the Dallas-Fort Worth area "to have fleets with certain percentages of machines of the most modern low-emission design as prescribed by the federal standard." 190 F. Supp. 2d at 928. Like SCAQMD in the courts below, TNRCC defended its fleet composition rule by arguing that "the regulation place[d] no technology-forcing sales restriction or sales quotas on nonroad equipment manufacturers." *Ibid.* Plaintiffs argued that the rule imposed emission standards and was therefore preempted by Section 209(e)(1). *Ibid.* The U.S. District Court for the

[5] An important substantive distinction in subsection (e)(1) is the inclusion of the phrase "or other requirement." The additional language has been interpreted to provide broader preemption than in Section 209(a), preempting not only the adoption and enforcement of standards relating to the control of emissions but also "in-use" requirements that are excepted from Section 209(a) preemption by Section 209(d). See *Huston*, 190 F. Supp. 2d at 927.

Western District of Texas agreed, relying on the EPA's express preemption of "fleet average standards" in 40 C.F.R. § 85.1603(c)(2), as well as the Second Circuit *Cahill* decision and the First Circuit *Commissioner* decision discussed above. TNRCC's fleet composition rule was therefore preempted by Section 209(e)(1).

Until the Ninth Circuit's wholesale acceptance of Judge Cooper's opinion in this case, courts had no difficulty understanding the breadth of preemption under Section 209(a) (and its parallel, Section 209(e)(1)). As the D.C. Circuit noted in *Engine Mfrs. Ass'n*, 88 F.3d at 1086, "the preemption scheme for motor vehicles has been working for almost thirty years." For the first time since the enactment of Section 209(a), a federal appellate court has subjected the preemption of state regulation under Section 209 to uncertainty. This Court should not tolerate such disharmony among the circuits.

III. THE RAMIFICATIONS TO THE CLEAN AIR ACT REGULATORY SCHEME OF ALLOWING THE UNCERTAINTY CREATED BY THE NINTH CIRCUIT'S DECISION TO REMAIN NECESSITATE A GRANT OF CERTIORARI

The importance of federal preemption to industries reliant on interstate commerce in motor vehicles has been discussed at length by Congress, the EPA, and the courts, and is not subject to genuine debate. It was precisely the "uncertainties involved in litigation" that Congress intended to avoid when preempting all state standards relating to the control of emissions from motor vehicles. 1967 U.S.C.C.A.N. at 1956. Judge Cooper's and the Ninth Circuit's holdings eviscerate Congress's goal, imposing the uncertainty of future regulation and inevitable litigation on a multitude of industries, including those represented by *amici*.

Courts have termed Section 209(a) preemption of state standards the "cornerstone" of the Clean Air Act scheme to regulate automobile emissions. *Engine Mfrs. Ass'n*, 88 F.3d at

1079 (citing *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Env'tl Conservation*, 17 F.3d 521, 526 (2d Cir. 1994)). Without preemption, "'the spectre of an anarchic patchwork of federal and state regulatory programs * * * threatened to create nightmares for the manufacturers.'" *Ibid.* (quoting *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1109). See also *Allway Taxi, Inc.* v. *New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.) (interpreting the legislative history and text of Section 209(a) to conclude that the purpose was "to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars"), aff'd, 468 F.2d 624 (2d Cir. 1972).

The EPA also has stressed the importance of the congressional intent to avoid a multitude of state standards. In an "advisory opinion" letter sent to the U.S. Court of Appeals for the First Circuit, in response to that court's self-described "somewhat inartful" application of the primary jurisdiction doctrine, the EPA noted the possibility of frustrating Congress's intent under the Clean Air Act through a narrow definition of the word "standards" in Section 209, which could result in state-by-state regulation of the number (or percentage) of ZEVs – or some other incarnation of motor vehicle that produces lesser emissions – that automakers must supply to the market.[6] *Commissioner*, 208 F.3d at 7. The EPA's advisory opinion adds to the unanimous understanding – apart from the

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[6] Judge Cooper drew a distinction between the ZEV sales requirements held preempted by the First Circuit in *Commissioner*, and the "purchase" requirements imposed by the SCAQMD Fleet Rules. As discussed more fully in the petition, the distinction is not legally cognizable. The EPA's expressed concern (discussed in *Commissioner*) for multifarious standards regarding sale of ZEVs applies equally where the state regulation imposes purchase requirements, which can differ from jurisdiction to jurisdiction and by logical necessity create "sale" requirements.

courts below – that Congress's intent regarding Section 209(a) preemption is uniformity of emissions standards.

The immediate negative effect of permitting the lower courts' rulings to stand would be significant, but the spread of similar regulations in the future as a result of these holdings may be of even greater concern. Left undisturbed, the Ninth Circuit's interpretation of Section 209(a) permits any State or locality within the Circuit's vast geographic boundaries to address its own pollution problem individually through restrictions aimed at purchasers of motor vehicles. States and localities outside the Ninth Circuit – previously kept in check by unanimous authority that prevented the enactment of regulations like the SCAQMD Fleet Rules – are encouraged to roll the dice by promulgating illegal regulations, in the hope of selling the spurious distinction between a purchase restriction based on emissions and "standards relating to the control of emissions" to their respective federal courts.

The legislative history of Section 209 contains recitals of the challenges facing automakers and the economic concerns associated with the need to comply with a multitude of regulatory schemes. When considering the text of what became Section 209(b), the limited waiver of preemption for California, Congress was concerned with two (federal and California) separate standards for control of emissions. "The manufacture of automobiles is a complex matter, requiring decisions to be made far in advance of their actual execution. The ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls and standards is of considerable importance so as to permit economies in production." 1967 U.S.C.C.A.N. at 1957. Because Congress expressly preempted any "third" standard for control of emissions, through the interplay of Sections 209(a), 177, and 209(b), the legislative history understandably does not consider the greater costs associated with a need to produce automobiles in light of three, four, or a patchwork of standards. Members of *amici* include engine manufacturers that may now

be forced to sell equipment that complies with SCAQMD's standard, and possibly many more standards should State or local regulations for emissions control proliferate.

It is not just manufacturers that stand to lose if the reasoning adopted by Judge Cooper and the Ninth Circuit is applied to allow the SCAQMD Fleet Rules – a third standard – as well as similar purchase restrictions by any other locality within the Ninth Circuit. Considering the potential problem of two emissions standards combined with just two administrative schemes, the House Report noted: "While manufacturers could meet [the problems of differing regulations] by building vehicles that meet whichever standard is the more stringent, this would lead to increased costs to consumers nationwide * * *." 1967 U.S.C.C.A.N. at 1958. The House Report also quoted a Senate Report from the original Clean Air Act: "[I]t would be more desirable to have national standards rather than for each State to have a variation in standards and requirements which could result in chaos insofar as manufacturers, dealers, and users are concerned." *Id.* at 1956 (quoting S. Rep. No. 192, 89th Cong). Such chaos is of particular concern to fleet operators, which, because of the mobile nature of their fleets, regularly exchange vehicles between locations in different jurisdictions. Individual operators could be required to purchase vehicles to comply with a multitude of different emissions standards.

Amici organizations have as members many such end users who would be subjected to greater costs and economic disadvantages under Judge Cooper's and the Ninth Circuit's rule. If subregion-by-subregion fleet rules are allowed to proliferate, operators that engage in exchanges between their various business locations will be forced to incur extraordinary costs to purchase or lease vehicles that meet the most stringent emissions standards. Small operators are given a strong incentive not to expand to the fifteen-vehicle size that triggers application of the SCAQMD Fleet Rules, and operators with barely more than the fifteen-vehicle trigger must either reduce

their size or be disproportionately affected. Confusion may also erupt when fleet operators located in one jurisdiction conduct business in another. An operator (of any size fleet) that leases vehicles to customers within SCAQMD will be required to stock vehicles that comply with the emissions standards set out in the Fleet Rules, so its customers will have access to compliant vehicles. The immediate damage of the Ninth Circuit's holding, and uncertainty and future costs, can be avoided if this Court grants the petition and reverses the Ninth Circuit's departure from the long-settled understanding of Section 209(a).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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